IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 4475 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

@

A M CHAUHAN (IPS),

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 4475 of 1997

MR YOGESH S LAKHANI for Petitioner No. 1

MR N.D.GOHIL, APP for Respondent No. 1

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 29/06/2002

ORAL JUDGEMENT

In this petition which is filed under Section 482 of the Code of Criminal Procedure, 1973 ('the Code' for short), petitioner who is an IPS Officer of 1981 batch and at the relevant point of time was serving as Superintendent of Police, Computer Centre, Gandhinagar,

against whom FIR dated July 24, 1997 is lodged vide CR No. 7/97 at Ahmedabad Rural and Gandhinagar, ACB Police Station, (Annexure-A to the petition) for commission of the alleged offences under Section 5(1)(e), and 5(2) of the Prevention of Corruption Act, 1947 and under Section 13(1)(e), 13(2) of the Prevention of Corruption Act, 1988 ('the Act' for short) and under Section 3(3) of Benami Transactions (Prohibition) Act, 1988, inter alia alleging that in his capacity as a public servant, he is allegedly found in possession of ill-gotten wealth for which he is unable to satisfactorily account of the pecuniary resources and properties which are disproportionate to his known source of income, has prayed to quash and set aside the said FIR on the grounds stated in the petition.

2. Since 1969, the petitioner has worked as a public servant in different Government departments/instrumentality of State till 1981 when he joined Indian Police Service. He is an income tax payer since 1972. The FIR is lodged against him on the basis of a complaint dated February 13, 1985, received from one B.K.Oza, wherein it is mentioned that the petitioner is having ill-gotten wealth which he has accumulated in the course of discharging his official duties as a public servant for which he has no satisfactory account. It is the say of the petitioner that though 12 years have elapsed till the date of filing of FIR on April 24, 1997, no explanation is asked for from him or from the persons in whose names the assets are allegedly accumulated. Except gathering information, the IO has not done anything by way of preliminary inquiry. As per the FIR, the petitioner is having, in all, nine immovable properties situated at various places at Ahmedabad, the value of which is approximately Rs.17,49,900/-. According the petitioner, out of the properties mentioned in the FIR, some stand in the name his son, brother and brother's wife, who are independent assessees on the record of Income Tax department, therefore, petitioner has nothing to do with those properties mentioned in the FIR. So far as the other properties which stand in his name are concerned, the market value of those properties as of 1997 has been mentioned though the same were purchased way back in 1992. The property shown at SNo.1 in the FIR was purchased in consideration of Rs.90,000/only. Out of nine assets shown in the FIR only two are shown in the name of the petitioner whereas other assets are alleged to be in the name of his son, who is an income tax payer since 1987 and in the name of wife of one of his brothers who is a government servant since 1973 working in Public Works Department and is independent since last more than 20 years. So far as

assets acquired by the petitioner are concerned, he has mentioned all such assets in the form and the intimation to that effect was sent to the respondent every year. Therefore, according to the petitioner, not a single asset mentioned in the FIR is a Benami Milkat and they are result of authentic and absolutely legal transaction by their respective purchasers. It is the say of the petitioner that pursuant to registering of the FIR, search was also carried out at the house of the petitioner on July 25, 1997 but nothing incriminating was found. Therefore, according to the petitioner, FIR lodged against him is illegal, arbitrary, vague and actuated out of colourable exercise of power in gross disregard to settled principles for launching prosecution against an IPS officer. It is the say of the petitioner that no reasonable opportunity by issuing show-cause notice to explain as to how the assets are not disproportionate to his known source of income had ever been given to the petitioner. Therefore, according to the petitioner, he is innocent and every transaction mentioned therein is authentic transaction by the owner. The IO has not asked for any pin-pointed explanation from the petitioner regarding the alleged assets except sending certain blank proforma with a letter dated September 30, 1992 in which the IO has requested the petitioner to disclose all the assets held by him. It is also the say of the petitioner that FIR suffer from delay and laches and is nothing but an attempt to malign the image of the petitioner and more particularly when the petitioner is over-due for his promotion. The petitioner states that he has written letter to the State Government on December 9, 1996 expressing his fear that he may be made a scapegoat and may be trapped in an unwarranted and illegal issue with malafide intentions at the ends of certain high ranking officers. The petitioner, therefore, filed this petition on all aforesaid counts to quash the FIR registered vide CR No. 7 of 1997 with ACB Police Station, Ahmedabad Rural and Gandhinagar (Annexure -A to the petition).

3. The petition is hotly contested by the respondent State Government by filing reply affidavit which is sworn by Dahyabhai Joitram Patel who is Assistant Director, Anti Corruption Bureau and Investigating Officer, Ahmedabad of CR No. 7 of 1997 registered at Ahmedabad Rural and Gandhinagar ACB Police Station. In para 3 of the reply affidavit an attempt is made to justify the recording of the CR No. 7 of 1997. It is also tried to justify that how nine properties mentioned in the FIR belong to the petitioner which have been purchased by him in the name of his relatives. It is also stated that

upon completion of investigation of FIR, if it is concluded that there are enough evidence about the offences committed by the petitioner and the investigation must be resulted into a charge sheet against the petitioner, then as per Section 13 of the Act, an opportunity of hearing shall be given to the petitioner and if the petitioner can explain properly regarding his income as well as the purchase of the properties, same shall also be considered by him before the charge sheet is filed. It is further stated that as on today he has not concluded whether the petitioner is an accused and whether a charge sheet is going to be filed or not. It is a matter of investigation which will be carried out by him as per the FIR. Therefore, a stage will come at which the petitioner will be given an opportunity to offer an explanation as per Section 13(1)(e) of the Act, and even thereafter, if he comes to the conclusion that the charge should be framed against the petitioner, a sanction should be obtained from the Home Department, which is also an additional check upon the investigation. Thus, enough opportunity will be given to the petitioner as per law. Lastly, it is stated that there are enough allegations against the petitioner with primafacie evidence and the FIR is not a bogus and concocted one and the ingredients of offence are there in the FIR. Therefore, the same may not be quashed by this Court under Section 482 of the Code. It is, therefore, prayed that there is no substance in the petition which may be dismissed.

4. It may be stated that the petitioner has also filed Rejoinder Affidavit wherein he has inter alia denied all the averments made in the reply affidavit filed by the Investigating Officer and stuck to his version which he has stated in the memo of the petition. It is reiterated that out of the nine properties, only two stand in his name whereas rest of the properties stand in the name of his son, brothers or brother's wife.

5. Mr. Y.S.Lakhani, learned advocate for the petitioner contended that before recording the FIR no reasonable opportunity, as envisaged in the Act has been granted to the petitioner to explain about the acquiring of the assets alleged in the FIR. Therefore, FIR is illegal, arbitrary, vague and actuated out of colourable exercise of power in gross disregard to settled principles for launching prosecution against an IPS officer for commission of the offences under Section 13(1)(e) of the Act which is punishable under Section 13(2) of the Act. The learned counsel also emphasized that on reading the FIR itself which is lodged on the basis of

the complaint received on February 13, 1985 from one B.K.Oza, it is clarified that out of nine properties 7 properties stand in the name of his son, brother and brother's wife and so far as other two properties are concerned, the investigating officer has mentioned the market value of the year 1997 though the same properties were purchased way back in 1992 and as per the sale deed, property shown at Sl.No.1 in the FIR was purchased in consideration of Rs.90,000/- only, therefore, FIR is lodged with malafide intention at the ends of certain high ranking officers with a view to malign the image of the petitioner and more particularly when the petitioner is overdue for his promotion. It is, therefore, prayed by the learned counsel that no offence as alleged in the said FIR, has been committed by the petitioner and, therefore, the said FIR is required to be quashed and set aside by allowing this petition.

6. Mr. N.D.Gohil, learned APP has contended that as per the statement made in the reply affidavit by the investigating officer, the investigating officer has not concluded whether the petitioner is an accused and whether charge sheet is going to be filed or not. It is a matter of investigation which will be carried out by him as per the FIR. Therefore, a stage will come at which the petitioner shall be given an opportunity of offering an explanation as per Section 13(1)(e) of the Act, and even thereafter, if he comes to the conclusion that charge should be framed against the petitioner, same will be done only on granting sanction by the Home department, which is also an additional check upon the investigation. Thus, enough opportunity will be given to the petitioner as per law. It is emphasized by the learned APP that the apprehension of the petitioner is not wellfounded as it is not necessary to call for the explanation before recording of the FIR and it is only after recording of the FIR and during the course of the investigation, an explanation is required to be called for. The investigation has not reached to that stage because after filing of the FIR immediately petitioner has moved this Court and obtained the stay, therefore, according to the learned APP there is no substance in the averments made in the petition and, therefore, petition deserves to be rejected.

7. I have given my anxious and considerate thought to the rival submissions made by the learned advocates appearing for the parties. I have perused the averments made in the memo of the petition, grounds set out therein, reply affidavit filed by the investigating officer, Rejoinder affidavit filed by the petitioner, FIR

which is impugned in this petition and the relevant documents forming part of the petition.

8. The expression "known source of income" must have reference to sources known to the prosecution on a thorough investigation of the case. It was not, and it could not be, contended that "known sources of income" means sources known to the accused. The prosecution cannot, in the very nature of things, be expected to know the affairs of an accused person. Those will be matters "specially within the knowledge" of the accused within the meaning of Section 106 of the Evidence Act. The source of income of a particular individual will depend upon his position in life with particular reference to his occupation or avocation in view. In the case of Government servant the prosecution would, naturally, infer that his known source of income would be the salary earned by him during his active service. His pension or his provident fund would come into calculation only after his retirement, unless he had a justification for borrowing from his provident fund. If the prosecution has failed to disclose all the sources of income of an accused person, it is always open to him to prove those other sources of income which have not been taken into account or brought into evidence by the prosecution. The legislature has advisedly used the expression "satisfactorily account". The emphasis must be on the word "satisfactorily", and the legislature has, thus, deliberately cast a burden on the accused not only to offer a plausible explanation as to how he came in possession of the large wealth, but also to satisfy the court that his explanation was worthy of acceptance. The government servant is to satisfactorily account for the disproportionate assets and not to prove his claim with mathematical exactitude beyond all possibility of doubt. One in many might be keeping accounts of expenditure for his satisfaction, but why should he procure and preserve supporting bills and vouchers? These are not government cash to be audited. Besides why should one keep them from the beginning of his career till his superannuation anticipating to be required in a Court of Law? Even for certain expenditure supporting vouchers are not feasible for which audit accepts a flat rate. The ingredients of the offence of criminal misconduct under Section 13(2) read with Section 13(1)(e) of the Act are the possession of pecuniary resources or property disproportionate to the known sources of income for which the public servant cannot satisfactorily account. To substantiate the charge, the prosecution must prove the following facts before it can bring a case under Section 13(1) (e)of the Act, namely; (1) it must establish that the accused is a

public servant, (2) the nature and extent of the pecuniary resources of property which were found in his possession, (3) it must be proved as to what were his known sources of income, i.e., known to the prosecution, and (4) it must prove, quite objectively, that such resources or property found in possession of the accused were disproportionate to his known source of income.

Once these four ingredients are established, the offence of criminal misconduct under Section 13(1)(e) of the Act is complete, unless the accused is able to account for such resources or property. The burden then shifts to the accused to satisfactorily account for his possession of disproportionate assets. The nature and extent of the burden cast on the accused is well settled. The accused is not bound to prove his innocence beyond all reasonable doubt. All that he need to do is to bring out a preponderance of probability.

9. Keeping in forefront the aforesaid prefatory note of settled principles underlying Section 13(1)(e) of the Act, let us examine the contents of the FIR. The impugned FIR is recorded on the basis of one complaint dated February 13, 1985 received by the ACB Police Station, Gandhinagar from one B.K.Oza and as per the averments made in the said written complaint, it inter alia reveals that allegations are made against the petitioner that in the capacity of a public servant on different posts from the period commencing from 1982 to 1993 he has received total salary of Rs.4,56,514/- and after deducting reasonable expenses for household @ 33% the amount of 1,52,156/-, which he must have spent and, therefore, remaining amount of Rs.3,04,358/- must be savings of the petitioner. However, the petitioner is in possession of the property worth Rs.16,29,900/- and the said properties are shown at SNo. 1 to 9 in the said FIR which stood in his name and as well as in the name of his son, brother and brother's wife. These are immovable properties, therefore, there is a reasonable apprehension that the petitioner has accumulated ill-gotten wealth disproportionate to his known source of income and on receipt of the said complaint, FIR came to be lodged and investigation was put into motion. Petition came to be filed in the month of August, therefore, there is no progress in the investigation. The contention that the investigating officer has not called for the explanations of the petitioner before recording of the FIR is not wellfounded. It is well settled principle that once the FIR is lodged, thereafter investigation is put into motion and unless the investigation is put into motion, where is the question of calling for the explanation?

The contention of the petitioner that before recording of FIR, his explanation ought to have been called for, is thoroughly misconceived.

10. Now the question which falls for determination of this Court is that as to whether in a petition filed under Section 482 of the Code of Criminal Procedure for quashing of the complaint, Court can quash the complaint registered for the alleged offence under Section 13(1)(e) of the Act only on the ground that the prosecution has not offered opportunity to the petitioner to tender his explanation with respect to the property which he possesses at pre-investigation stage.

11. In the case of MUNICIPAL CORPORATION OF DELHI V. RAM KISHAN ROHTAGI AND OTHERS, AIR 1983 SC 67, Supreme Court has held that proceedings against an accused in the initial stages can be quashed only if on the face of the complaint or the papers accompanying the same, no offence is constituted. In other words, the test is that taking the allegations and the complaint as they are, without adding or substracting anything, if no offence is made out then the High Court will be justified in quashing the proceedings in exercise of its powers under Section 482.

12. In the case of STATE OF M.P. AND OTHERS V. SHRI RAM SINGH, 2000(1) G.L.H. 669, Supreme Court has held that Procedural delays and technicalities of law should not be permitted to defeat the object sought not to be achieved by the Act. The overall public interest and the social object is required to be kept in mind while interpreting various provisions of the Act and decided cases under it. In the said case the accused possessed assets disproportionate to known sources of income. Section 17 of the Act, was not complied, hence High Court quashed the proceedings, therefore, while setting aside the order of the High Court, Supreme Court has said that procedural delays and technicalities of law should not be permitted to defeat the object sought to be achieved by the Act.

13. In the case of STATE BY CENTRAL BUREAU OF INVESTIGATION V. S.BANGARAPPA, AIR 2001 SC 222, since the High Court has quashed and set aside the FIR lodged against S.Bangarappa, one time Chief Minister of Karnataka State for commission of the offences under Section 13(1)(e) of the Act, on the ground that the persons authorised to investigate have not conducted the investigation as envisaged under Section 17 of the Prevention of Corruption Act, 1988, the Supreme Court,

while setting aside the order of the High Court of Karnataka by which the FIR against S.Bangarappa, one time Chief Minister was quashed, has observed in paragraph 23 as under:

> "No doubt the prosecution has to establish that the pecuniary assets acquired by the public servant are disproportionately larger than his known sources of income and then it is for the public servant to account for such excess. The offence becomes complete on the failure of the public servant to account or explain such excess, (vide M.Krishna Reddy v. State Dy. Superintendent of Police, 1992 (4) SCC 45, P.Nallammalm v. State (1999)6 SCC 559:(1999 AIR SCW 2752:AIR1999 SC 2556:1999 CRI LJ 3967). It does not mean that the Court could not frame charge until the public servant fails to explain the excess or surplus pointed out to be the wealth or assets of the public servant concerned. This exercise can be completed only in the trial. (K.Veeraswami v. Union of India, (1991 (3) SCC 65, State of Maharashtra v. Ishwar Piraji Kalpatri, (1996) 1. SCC 542 : (1996 AIR SCW 15: AIR1996 SC 722: 1996 CRI LJ 1127). In the latter decision the Court held thus (para 16 of AIR, Cri.LJ):
>
> 'The opportunity which is to be afforded to the delinquent officer under Section 5(1)(e) of the Act (corresponding to Section 13(1)(e) of 1988 Act of) of satisfactorily explaining about his assets and resources is before the Court when the trial commences, and not at an earlier stage.'"

14. In view of the aforesaid judgement, the opportunity which is to be offered to the delinquent officer under Section 13(1) (e) of the Act of satisfactorily explaining about his assets and resources is before the Court when the trial commences and not at an earlier stage.

15. Applying the principles laid down by the Supreme Court in the above referred to judgement to the facts of the present case, in the instant case that stage has not reached because investigation has not yet began by virtue of the order of stay granted by this Court. On having a look at the averments made in the affidavit in reply filed by the investigation officer, he has stated that he will offer opportunity to the petitioner to explain his

source of income and thereafter also stage of sanction by the Home Department would come and ultimately before the Court also the petitioner has an ample opportunity to explain his known source of income and to show that the properties are not disproportionate to the known source of his income.

16. In the case of SATYANARAYAN SHARMA V. STATE OF RAJASTHAN, (2001) 8 SCC 607, Supreme Court has said that Section 19(3)(c) of the Act (1988), per curiam, bars grant of stay of proceedings by use of any power by any Court or any ground and even by High Court in exercise of its inherent jurisdiction under Section 482 of the CrPC. In para 17, Supreme Court has observed that;

> "Thus in cases under the Prevention of Corruption Act, there can be no stay of trials. We clarify that we are not saying that proceedings under Section 482 of the Criminal Procedure Code cannot be adapted. In appropriate cases proceedings under Section 482 can be adapted. However, even if petition under Section 482 of the Criminal Procedure Code is entertained, there can be no stay of trials under the said Act. It is then for the party to convince the court concerned to expedite the hearing of that petition. However, merely because the court concerned is not in a position to take up the petition for hearing would be no ground for staying the trial even temporarily."

17. The sum and substance of the ratio laid down by the Supreme Court in the above referred to judgement is that High Court while exercising the powers under Section 482 of the Code by virtue of the bars contained in Section 19(3)(c), further proceedings cannot be stayed in a case filed under the Act.

18. In view of the discussions made herein above, and by relying upon the judgements referred to hereinabove, I am of the opinion that FIR vide CR No. 7 of 1997 is registered against the petitioner for commission of the alleged offences under Section 13(1)(e) of the Act and as per the said FIR he is found to be in possession of ill-gotten wealth which is disproportionate to his known source of his income. Therefore, that FIR cannot be thwarted at pre-investigation stage. The offering of the explanation of the petitioner to establish that the properties found with him are not disproportionate to the known source of his income cannot come prior to recording of FIR and it will come only after recording of the FIR.

Therefore, during the course of investigation that stage would come and in the reply affidavit, investigation officer has also stated that he will definitely call for the explanation of the petitioner with respect to the properties mentioned in the FIR as to whether they are disproportionate to his known source of income or proportionate to his known source of income.

19. Seen in the above context, there is no valid reason or justifiable ground to quash the FIR registered against the petitioner. Hence, since there is no substance in the challenge made by the petitioner, the petition deserves to be dismissed.

20. For the foregoing reasons, petition fails and accordingly it is dismissed. Rule is discharged. Ad-interim relief granted while issuing rule shall stand vacated.

21. At this stage, Mr. Y.S.Lakhani, learned advocate for the petitioner urged that the interim relief granted at the the time of issuing rule staying further proceedings of the impugned FIR, which has remained operative till today, may be continued for a further period of six weeks hereof to enable the petitioner to approach the higher forum. It may be mentioned that this petition came to be filed in the year 1997 and by virtue of interim relief granted by this Court, investigation of the impugned FIR has been stayed which has remained operative till today. This Court has dismissed the petition by considering the statutory provisions contained in the Act as well as the latest pronouncements of the Supreme Court and, therefore, continuing the interim relief for a further period of 6 weeks hereof would run counter to the statutory provision of the Act and the latest judgement of the Supreme Court in the case of SATYA NARAYAN SHARMA (supra). Therefore, the prayer for continuing the interim relief for a further period of 6 weeks hereof cannot be entertained which is deserves to be rejected and hence it is rejected.

(A.M.Kapadia,J)

Jayanti*